

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

Original Affidavit
77-4029

To be argued by
ROBERT S. GROBAN, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-4029

CHENG CHUEN TAI,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF
IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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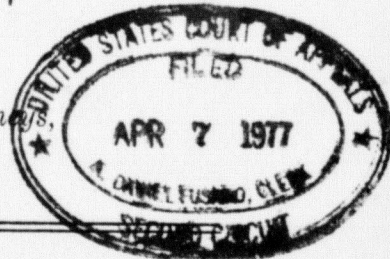


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IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR RESPONDENT

Preliminary Statement

Pursuant to Section 106 of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1105a, Cheng Chuen Tai ("Cheng") petitions this Court to review a portion of the final order of deportation entered against him on September 14, 1976 by the Board of Immigration Appeals ("Board"). The Board's order in pertinent part dismissed Cheng's appeal from the June 14, 1976 decision of Immigration Judge Alexander Schonfeld denying Cheng's motion to amend the Order to Show Cause, issued against him on June 2, 1976 by the Immigration and Naturalization Service ("Service"), by substituting the People's Republic of China ("Mainland China") for the Republic of China on Taiwan ("Nationalist China") in the allegation of nationality contained in that order.

It is the Immigration and Naturalization Service's position that the Board's decision was correct and this petition for review should be dismissed because: (1) the

Attorney General's determination that aliens born on the Mainland of China are citizens of Nationalist China represents a political decision, not reviewable by this Court; and (2) even if the Attorney General's determination in this case were reviewable, it still was supported by substantial and probative evidence in the record considered as a whole.

Issues Presented

1. Is the Attorney General's Decision To Consider Aliens Born On The Chinese Mainland Citizens Of Nationalist China For The Purposes Of Section 243(a) Reviewable By This Court?
2. Was The Attorney General's Determination, That Cheng Was A Citizen Of Nationalist China For The Purposes Of Section 243(a), Supported By Substantial Evidence In The Record Considered As A Whole?

Statement of Facts

The petitioner, Cheng Chuen Tai, was born in Foochow, China (AR 10).¹ From China, Cheng traveled to Hong Kong, where he obtained a seaman's book,² and,

¹ References preceded by the letters "AR" are to the certified administrative record previously filed with this court.

² A seaman's book is a document of identity that is issued and accepted by many countries in lieu of a passport. Pursuant to Section 101(a)(30) of the Act, 8 U.S.C. § 1101(a)(30), and the Service's interpretation of that section in its Operation Instructions at 101.2(a)(3), a seaman's book, issued by the Hong Kong Government to a crewman born in China, meets the definition of passport and, assuming the alien is otherwise eligible for admission, can be used by that alien to gain entry into the United States when his vessel or aircraft has arrived here.

subsequently, to Canada (AR 10, 17). On December 23, 1970 Cheng surreptitiously and unlawfully entered the United States at an unknown point on the Canadian border in violation of Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) (AR 9, 17). He has continued to work and to reside illegally in this country since that date.

On June 2, 1976 the Service instituted deportation proceedings against Cheng by serving him with an Order to Show Cause, Notice of Hearing and Warrant for his arrest (AR 17). The order to show cause alleged, *inter alia*, that Cheng was a citizen of Nationalist China and was subject to deportation for entering the United States without inspection on December 23, 1970 (Id.).³ It also notified Cheng to appear on June 3, 1976 at a deportation hearing in which the validity of these charges would be determined (Id.).⁴ Subsequently, Cheng's hearing apparently was adjourned to June 14, 1976 (AR 8).

Cheng's deportation hearing commenced on June 14, 1976 before Immigration Judge Alexander Schonfeld (Id.). At this hearing Cheng was represented by an attorney who, in his presence and on his behalf, conceded all of the substantive allegations contained in the order to show cause which related to his deportability (AR 9, 10). Thus, in summary, Cheng admitted voluntarily that he was not a citizen or national of the United

³ Pursuant to Section 235(a) of the Act, 8 U.S.C. § 1225(a), all aliens seeking to enter the United States must submit to an inspection by one or more Service officers during which the Service officer must determine if the alien is eligible for admission to the United States. Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), provides that any alien in the United States shall, upon the order of the Attorney General, be deported who entered this country without inspection. It is under this provision that Cheng was charged with being a deportable alien.

⁴ See 8 C.F.R. § 242.1(b).

States, that he had entered this country unlawfully and in a stealthy manner on December 23, 1970, and that, as a result, he was deportable as charged (Id.).

After conceding deportability Cheng's attorney informed Immigration Judge Schonfeld that Cheng wished to contest the allegation in the order to show cause which charged Cheng with being a citizen of Nationalist China but that, if the allegation were amended by the Service to charge Cheng with being a citizen of Mainland China, he would concede the truth of that allegation as well (AR 9).⁵ However, Cheng's attorney did not allude to,

⁵ As the Third Circuit recently noted in *Cheng v. Immigration and Naturalization Service*, 521 F.2d 1351, 1352-3 (3rd Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976), in a *per curiam* opinion which rejected the same contentions raised in this appeal, the significance of Cheng's request to amend the order to show cause by substituting Mainland China for Nationalist China is apparent if the procedures mandated by the Act to determine the country to which an alien shall be deported are examined.

After the Immigration Judge has determined that an alien is deportable, Section 243(a) of the Act, 8 U.S.C. § 1253(a), requires him to make a three-tiered inquiry to determine the country to which the alien should be deported. Initially the Immigration Judge must ask the alien if there is any country to which he would like to be deported. Should the alien fail to designate such a country or should the country so designated advise the Service that it will not accept the alien or fail to advise the Service whether it will or will not accept the alien within three months after inquiry by the Service, then the Immigration Judge must order the alien's deportation "to any country of which such alien is a subject national, or citizen if such country is willing to accept him...." Finally, if either the Service or the Immigration Judge believes that the alien's deportation cannot be effectuated pursuant to the first two steps, then the Judge can select another country which bears some relationship to the alien's past or, if no such country is available, which is willing to accept the alien. Section 243(a)(1)-(7) of the Act, 8 U.S.C. § 1253(a)(1)-(7). It is at the second phase of this process, the Immigration

[Footnote continued on following page]

or offer into evidence, *any* factual support for his contention that he was a citizen of Mainland China.⁶

In response to this request, Judge Schonfeld permitted the Service's attorney to question Cheng about his nationality (AR 10). During this inquiry, after asserting that he had been born in Foochow, Cheng failed to produce *any* evidence supporting this naked contention or demonstrating any subsequent relationship with Mainland China. However, Cheng did admit that, while he did not have a passport from any country, he had been issued a seaman's book in Hong Kong, his last country of residence (Id.).

Judge's selection of the alien's country of citizenship, that Cheng's nationality became crucial for had he been ordered deported to Mainland China, as requested by his attorney, he would then have been able to apply for withholding of his deportation under Section 243(h) of the Act, 8 U.S.C. § 1253(h), on the grounds that he would be subject to political persecution if returned to Mainland China. If this application were granted, "he would have received an indefinite stay of deportation." *Cheng v. Immigration and Naturalization Service*, *supra*, at 1353.

⁶In general the Service has the burden of proof to demonstrate alienage and deportability in a deportation proceeding. *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963). However, once alienage and deportability are established or, as in Cheng's case, admitted by the alien, the burden shifts to the alien who must prove his entitlement to any affirmative relief. See Gordon and Rosenfeld, *Immigration Law and Procedure*, Section 5.10(b), or the validity of any affirmative defense he may have to deportation, like a claim of United States citizenship. *United States ex rel. Rongetti v. Neelly*, 207 F.2d 281 (7th Cir. 1953). Thus, in Cheng's deportation proceeding, once he admitted his alienage and deportability he had the burden of proof to demonstrate his eligibility for the affirmative relief he requested by introducing some evidence to show that he was a citizen of Mainland China. *United States ex rel. Rongetti v. Neelly*, *supra*, at 284. Moreover, this is not an unreasonable burden since the alien is the person most likely to have in his possession the information necessary to support such a claim. Cheng's failure to introduce *any* evidence supporting his claim to citizenship in Mainland China fatally undercuts his contentions in this regard.

Based on Cheng's failure to show any relationship with Mainland China and the Board's precedent decision⁷ in *Matter of S-Y-L*, 9 I.&N. Dec. 575 (BIA, 1962), which affirmed an Immigration Judge's decision ordering an alien born on the Chinese mainland to be deported to Nationalist China rather than Mainland China because the United States does not recognize the latter government, Immigration Judge Schonfeld denied Cheng's request and proceeded to determine the country to which he would be deported (AR 11). Pursuant to the requirements of Section 243(a) of the Act, 8 U.S.C. § 1253(a), the Immigration Judge initially inquired with Cheng's attorney whether Cheng wished to designate a country for deportation. Curiously, in light of his efforts to amend the allegation of nationality in the order to show cause, Cheng did not designate Mainland China⁸ but instead chose Singapore (Id.).

⁷ See 8 C.F.R. § 3.1(g) which permits the Board of Immigration Appeals to designate certain of its decisions to be precedent decisions, binding on all officers and employees of the Service.

⁸ Cheng's professed affiliation with Mainland China is severely undermined by the fact that, after the Immigration Judge had rejected his motion to amend the order to show cause, he failed to designate Mainland China as the country to which he preferred to be deported. Had such a designation been made in good faith, compare, *Lam Tat Sin v. Esperdy*, 334 F.2d 999 (2d Cir.), cert. denied, 379 U.S. 901 (1964), the Attorney General, through the Service, would have had to attempt to inquire with the Mainland Chinese government whether it would accept Cheng notwithstanding the fact that the United States does not recognize Mainland China to be the government of China. *United States ex rel. Man v. Murff*, 264 F.2d 926 (2d Cir. 1959); *Hom Sin v. Esperdy*, 209 F. Supp. 3 (S.D.N.Y. 1962). However, based upon recent State Department pronouncements, see *Cheng v. Immigration and Naturalization Service*, *supra*, at 1353, it is clear that such an inquiry would have been impossible given the absence of diplomatic relations between the United States and Mainland China and that ultimately Cheng would have been ordered deported either to his country of nationality, Nationalist China, or to the country where he last resided, Hong Kong, pursuant to the final two phases of the selection process set forth in Section 243(a).

After Cheng designated his country of deportation Judge Schonfeld issued an order which granted Cheng thirty days in which to depart voluntarily⁹ and alternative orders of deportation to Singapore, then Nationalist China, and then Hong Kong¹⁰ should Cheng fail to depart voluntarily within his allotted time (AR 16).

On June 22, 1976 Cheng filed his notice of appeal with the Board of Immigration Appeals (AR 7). In that notice, as he had before Immigration Judge Schonfeld, Cheng asserted that he was a citizen of Mainland China, not Nationalist China, and that Judge Schonfeld's denial of his request to amend the order to show cause to reflect this resulted in an erroneous order of deportation (*Id.*). Again, Cheng submitted no evidence to the Board sup-

⁹ See Section 244(e) of the Act, 8 U.S.C. § 1254(e), and 8 C.F.R. § 244. This relief can be granted by an Immigration Judge to an alien if the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States. If granted it removes the stigma of an order of deportation from the alien's record and this facilitates any future lawful reentry into this country he might wish to make. See Section 212(a) (17) of the Act, 8 U.S.C. § 1182 (a) (17).

¹⁰ The Immigration Judge's alternative order of deportation to Hong Kong was made pursuant to the third level of inquiry required by Section 243(a) of the Act, 8 U.S.C. § 1253(a). As discussed above (*see* footnote 5, *supra*) the Immigration Judge was first required to order Cheng deported to the country he designated and then, if that was not practicable, to his country of nationality or citizenship. However, the Service apparently suspected in this case (AR 12), that it would be unable to effectuate Cheng's deportation to either his country of designation or to his country of nationality or citizenship and it requested the Immigration Judge to order Cheng's deportation to Hong Kong, the country in which he resided prior to entering the country from which he entered the United States. See, Section 243(a) (5) of the Act, 8 U.S.C. § 1253(a) (5).

porting the naked allegation of citizenship he repeated in his notice of appeal (*Id.*).¹¹

On September 14, 1976, after reviewing the entire record, the Board dismissed Cheng's appeal (AR 4, 5). In its decision the Board affirmed the Immigration Judge's conclusion that the facts of the case and the Board's prior precedent decision in *Matter of S-Y-L, supra*, did not warrant a finding that Cheng was a citizen of Mainland China (AR 5). The Board also granted Cheng thirty days from the date of its opinion in which to depart voluntarily from the United States (AR 2, 5).

Cheng, however, did not depart, nor did he or his attorney either request an extension of his voluntary departure time or immediately petition this Court to review the Board's decision. He did nothing. Consequently, on December 14, 1976, the Service issued a warrant for his deportation pursuant to the alternative order of the Board (AR 1). On January 25, 1977 Cheng filed his petition for review of the Board's September 14, 1976 decision. He has since remained in the United States pursuant to the automatic statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

¹¹ Pursuant to 8 C.F.R. § 3.1(d)(1), the Board of Immigration Appeals is empowered to exercise those powers delegated to the Attorney General by Congress in Section 103 of the Act, 8 U.S.C. § 1103, which are appropriate and necessary for the resolution of each case. This authority includes the power to review evidence pertinent to the case which was not presented to the Immigration Judge below.

Relevant Statute

Immigration and Nationality Act, § 243(a), 66 Stat. 163 (1952), *as amended*, 8 U.S.C. § 1253

(a) The Deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any

priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth;
or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

* * * * *

ARGUMENT

POINT I

The Attorney General's Decision, To Consider Aliens Born On The Chinese Mainland Citizens Of Nationalist China For The Purposes of Section 243(a) Of The Act, Manifests An Act Of National Sovereignty, Not Reviewable By This Court.

A. Introduction

In adopting the Immigration and Nationality Act of 1952, 66 Stat. 166, as amended, 8 U.S.C. 1101 et seq., Congress acted in accordance with the ancient principle of international law that a sovereign nation has the inherent power to exclude or admit foreigners on such terms and conditions as it may prescribe. See *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).¹² This firmly-established principle, dating from Roman times,¹³ received recognition during the Constitutional Convention¹⁴ and has continued to be a postulate in the foreign relations of

¹² See also *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring); *Bar. International Law* 708, n. 2 (Gillespie ed. 1883).

¹³ Borchard, *Diplomatic Protection of Citizens Abroad* 33, 44-48 (1915).

¹⁴ See 3 *Papers of James Madison* 1277 (1840), where Madison reports Gouverneur Morris' observation during the debates that "every society, from a great nation down to a club, ha[s] the right of declaring the conditions on which new members should be admitted." Article I, Section 9, Clause 1, of the Constitution itself is an implicit recognition of Congress' authority to regulate immigration. In addition, Article III of the Jay Treaty of 1794, 8 Stat. 116, 117, provided that British and American subjects could freely cross the Canadian border. See *Karnuth v. United States*, 279 U.S. 231 (1929).

the United States and the other members of the international community.¹⁵

Nearly a century ago the United States Supreme Court recognized the power to admit or exclude aliens as inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachment—a power to be exercised exclusively by the political branches of government and not to be “granted away or restrained on behalf of any one.” *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889). “[O]ver no conceivable subject is the legislative power of Congress more complete than it is over” the admission and expulsion of aliens. *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). Encompassed within Congress’ “plenary power to make rules for the admission of aliens” *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118, 123 (1967) are the comparably broad powers “to fix the conditions under which aliens are to be permitted to enter * * * this country.” *Flemming v. Nestor*, 363 U.S. 603, 616 (1960) and to establish and administer procedures by which aliens who violate these rules of admission are to be expelled from this country. *United States ex rel. Suey v. Spar*, 149 F.2d 881 (2d Cir. 1945); *Marcello v. Kennedy*, 194 F. Supp. 748 (D.C.D.C. 1961). Whether a particular alien or class of aliens may be allowed to enter the United States is “a matter wholly political in its character” *Lem Moon Sing v. United States*, 158 U.S. 538, 548 (1895), “a matter of political outlook and national self-interest” *Harisiades v. Shaughnessy*, *supra*, at 596 (Frankfurter,

¹⁵ See, e.g., Convention between the United States of America and other American Republics regarding the status of aliens, Article I, 46 Stat. 2753, 2754; Constitution of the Intergovernmental Committee for European Migration, 6 U.S.T. 603, (1955); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

J., concurring), and a matter "depend[ent] on the congressional will" *Shaughnessy v. Mezei*, 345 U.S. 206, 216 (1953). Similarly, where two governments claim to represent the citizens of a country and both Congressional and Executive branches, for whatever reasons, have decided to recognize only one of these governments, the Attorney General's determination under Section 243(a) of the Act of the country of which a particular deportable alien is a subject, national or citizen is a decision so intimately related to the foreign policy of this country that the Courts have consistently supported his determination in this area by recognizing the political considerations involved in these decisions and affirming them. *Lee Wei Fang v. Kennedy*, 317 F.2d 180, 184 (D.C. Cir. 1963); *Ng Kam Fook v. Esperdy*, 320 F.2d 86, 89 (2d Cir.), cert. denied, 375 U.S. 955 (1963); *Shyu Jeng Shyong v. Esperdy*, 294 F. Supp. 355, 356 (S.D.N.Y. 1969). Moreover, to date, the Courts of this and every other circuit have unanimously affirmed determinations by the Attorney General that aliens, who were born on the Chinese mainland but who have left, are to be considered citizens of Nationalist China for the purposes of Section 243(a) of the Act since the United States does not recognize the government of Mainland China. *Cheng v. Immigration and Naturalization Service*, *supra*; *Ng Kam Fook v. Esperdy*, *supra*; *Lee Wei Fang v. Kennedy*, *supra*; *United States ex rel. Man v. Murff*, *supra*; *Dai Ming Shi v. Kennedy*, 297 F.2d 791 (D.C. Cir.), cert. denied, 369 U.S. 844 (1961); *Chu Lam v. Esperdy*, 209 F. Supp. 1 (S.D.N.Y. 1962); *Chao Chin Chen v. Murff*, 168 F. Supp. 349 (S.D.N.Y. 1958).

It is against this consistent record of judicial abstention in these inherently political matters that Cheng's claim in this appeal must be examined.

B. The Attorney General's Determination That Cheng Was A Citizen Of Nationalist China Was Correct.

In his brief (at pages 8-9) Cheng admits that the decisions of the various courts which have discussed the issue he raises in this appeal have unanimously rejected his contention. However he asserts that recent developments in Mainland China's relationships with the international community in general, and the United States in particular, justify this Court in abandoning the position of judicial abstention which it, and all other courts presented with this issue, have taken since the question was first raised. Specifically, Cheng argues that because Mainland China now occupies a seat on the Security Council at the United Nations, now appears to be permanently entrenched as the Government of the Chinese Mainland¹⁶ and now issues visas and passports which are

¹⁶ To support this contention Cheng included in the appendix to his brief a notice from the Service to an alien in an unrelated case that procedures existed whereby he could "attempt to obtain evidence" from Mainland China of his relationship to certain other aliens (see page A-13). Initially it must be noted that this notice is not part of the certified administrative record upon which this appeal must be decided, Section 106 (a)(4) of the Act, 8 U.S.C. § 1105a(a)(4), and that it was inserted into the appendix without consultation with, or the consent of, the respondent despite the requirements of Rule 30 of the Rules of Appellate Procedure. However, regardless of the improper manner in which it was presented to this Court, it is clear that the procedure outlined in that notice does not constitute an admission by the Service or the United States that the government of Mainland China is either *de jure* or permanent. Rather, the notice is merely an attempt by the Service to assist aliens to acquire those documents required by the Act to enable them to confer immigration benefits on their "relatives". See, Section 101(b)(1) of the Act, 8 U.S.C. § 1101(b)(1).

recognized by most countries of the world,¹⁷ it should be considered as a country as that term is used in connection with citizenship and nationality in Section 243(a) of the Act. In addition, Cheng points to the diplomatic contacts and trading which have occurred between Mainland China and the United States in recent years, as well as his alleged preference for the Mainland Chinese government,¹⁸ and concludes that these factors represent a change in international and bilateral relations with Mainland China which now support this Court's intervention into the Attorney General's determinations of nationality under Section 243(a) of the Act. A brief examination of the purposes underlying Section 243(a) of the Act as well as the Third Circuit Court of Appeals' recent *per curiam* decision in *Cheng v. Immigration and Naturalization Service, supra*, which rejected the identical contention made in this appeal *after* examining the change in international atmosphere alluded to by Cheng, will demonstrate the propriety of the Attorney General's determination in this case.

1. The Attorney General's decision is supported by the Congressional purpose underlying Section 243(a) of the Act.

The Court of Appeals for the District of Columbia Circuit noted in *Rogers v. Cheng Fu Cheng*, 280 F.2d 663, 665 (D.C. Cir.), *cert. denied*, 364 U.S. 891 (1960), that:

¹⁷ Cheng, of course, did not have such a passport and traveled on a seaman's book issued to him by the Hong Kong government (AR 10).

¹⁸ Contrary to Cheng's contentions, at no point in his administrative hearing did he express a preference for Mainland China over Nationalist China. In fact, he did not even designate Mainland China as the country to which he wished to be deported. Rather, Cheng merely made a procedural motion to amend the allegation of nationality contained in the order to show cause issued against him by the Service.

"... Congress' evident purpose [in enacting Section 243(a) of the Act was] to reduce the number of 'undeportables' by increasing the number of places to which an alien under a final order of deportation may be sent. To hold otherwise would open to doubt the Attorney General's power to deport aliens to areas of the world where diplomatic status is unsettled, such as various trusteeships, protectorates or colonies." (footnote omitted). See also, *Ng Kam Fook v. Esperdy*, *supra*, at 89; *Lee Wei Fang v. Kennedy*, *supra*, at 184.

In his brief Cheng asserts that Congress' avowed policy in Section 243(a) will not be frustrated if this Court determines that he is a citizen of Mainland China because "the Attorney General can now encounter no difficulty in effecting the deportation of the petitioner... [since]... [t]he United States and the People's Republic of China now maintain reciprocal diplomatic missions in the capitals of each other." (Cheng's brief, page 15). This contention is completely without merit in two respects. Initially, as the Third Circuit recently noted in *Cheng v. Immigration and Naturalization Service*, *supra* at 1353:

"In response to inquiry of this Court, the Department of State has reaffirmed that it considers petitioner, and persons in his circumstances [like Cheng in this appeal], to be citizens of Taiwan:

'Normally, the United States does not deport aliens to countries with whose governments we do not have diplomatic relations. At the present time, with respect to persons who come from Mainland China and claim to be citizens of the People's Republic of China and not the Republic of China, we believe there is no appropriate government with which we

have diplomatic relations for purposes of directing a request for admission of an alien pursuant to Section 1253(a)."

In this regard the adoption by this Court of the position urged by Cheng in this appeal would create the precise situation about which the Court warned in *Lee Wei Fang v. Kennedy*, *supra*, at 184, when it noted:

"Since effectuation of deportation to the country of which the alien is a national depends, under the statute, on securing the prior consent of the government, the statute would be deprived of effectiveness where there are two 'governments', if the Attorney General were required to secure the consent of the government not recognized by the United States. Not only are the customary diplomatic channels not available for this purpose, and the required consent virtually unobtainable, but the Attorney General would be obliged to subvert in a substantial sense the established foreign policy of the United States and the result would be that the purpose of Congress to reduce the number of undeportables, see *Rogers v. Cheng Fu Sheng*, *supra*, would also be obstructed."

There is another, more practical reason why adoption by this Court of Cheng's contention would frustrate Congress' intent in Section 243(a) to reduce the number of "undeportable" aliens. Since Cheng did not designate Mainland China as the place to which he wished to be deported, and, in fact, apparently left Mainland China for Hong Kong because he did not like the conditions there, it is apparent that Mainland China is the last place Cheng wants to find himself and that he has made his "tongue-in-cheek" contention about being a citizen of Mainland China solely for the purposes of applying for Section 243(h) relief should his argument be accepted

by this Court.¹⁹ *Ng Kam Fook v. Immigration and Naturalization Service*, *supra*, at 1352-53. Ironically, if Cheng's 243(h) application were granted, he would receive an indefinite stay of deportation by means of the very statute which Congress enacted to reduce the number of deportable aliens! Clearly such a result should be avoided. As the Court noted in *Lee Wei Fang v. Kennedy*, *supra*, at 188:

"It is amply plain from the record and from counsels' statements in oral argument that plaintiffs-appellants do not desire to be deported to Communist China, and would resist any such action if it were ordered. They thus are in no position to ask relief from a Court of equity. cf. *Chao Chin Chen v. Murff*, 168 F.Supp 349 (S.D.N.Y. 1958). The extra-ordinary remedies of equity are available to those who have a real grievance—not to those who are asking relief for purposes of delay, and relief which if granted they would promptly repudiate." (footnotes omitted).

2. The Attorney General's decision is supported by the Third Circuit's recent *per curiam* decision in *Cheng v. Immigration and Naturalization Service*.

In *Cheng v. Immigration and Naturalization Service*, *supra*, the petitioner was also an alien who had been born in Foochow, had traveled to Hong Kong, and had illegally entered the United States. In 1972 he was apprehended by the Service and given a deportation hearing at which he conceded his deportability and was ordered deported

¹⁹ Pursuant to Section 243(h) of the Act, 8 U.S.C. § 1253-(h), an alien may submit an application for withholding of his deportation if he has been ordered deported to a country in which he can show he would be subject to persecution on account of race, religion or political opinion ("243(h) application").

to Nationalist China or Hong Kong in the alternative. Subsequently, the petitioner moved to reopen his deportation hearing "on the ground that the United States had, in the interim, altered its position with respect to the People's Republic of China". *Cheng v. Immigration and Naturalization Service, supra*, at 1352. This motion was denied by both the Immigration Judge to whom it was presented, and by the Board of Immigration Appeals, and petitioner sought review of these decisions in the Third Circuit Court of Appeals. The issue presented in the appeal, as stated by the Court, was "whether petitioner is a 'subject national or citizen of' the People's Republic of China within the meaning of 8 U.S.C. § 1253(a)". *Cheng v. Immigration and Naturalization Service, supra*, at 1351. However, the Court also noted that, in light of his lack of contact with Mainland China, the issue was important to the petitioner only insofar as it would enable him to submit a 243(h) application. *Cheng v. Immigration and Naturalization Service, supra* at 1342-53.

In response to the contention raised by the petitioner in *Cheng*, the Third Circuit inquired with the State Department as to whether the United States' attitude toward Mainland China had altered its position with respect to aliens like the petitioner (and Cheng in this case) who claimed to be citizens of Mainland China. When the State Department responded that it still considered aliens in petitioner's position to be citizens of Nationalist China because the United States did not have relations with Mainland China and therefore could not request it to accept deportable aliens, the Third Circuit, in a *per curiam* opinion, concluded that it had "no basis" for overturning the decision of the Board and dismissed the appeal. *Cheng v. Immigration and Naturalization Service, supra*, at 1353.

As is readily apparent, both the pertinent facts²⁰ and the issue presented to the Third Circuit in *Cheng* are identical to the ones in this appeal. Consequently, the Court's opinion in that case should be dispositive of this appeal and the Attorney General's determination, that Cheng was a citizen of Nationalist China for the purposes of Section 243(a), should be affirmed on that basis.

C. Conclusion

No alien has any constitutional right to immigrate to the United States or to remain here, having entered unlawfully, if deportable under the Act. *Kliendienst v. Mandel*, *supra*. While the Congressional decision whether and in what manner to deport aliens here in violation of law is subject to the constraints of the due process clause of the Fifth Amendment, *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966), the concomitant determination, where to deport a concededly deportable alien, is so intertwined with this country's foreign policy, like the decisions whether to extend formal recognition to, enter into a treaty with, or declare war against a foreign country, it is not a subject of judicial concern. This is especially true where, as here, the issue under review involves the relationships between the Unit-

²⁰ In his brief (pages 19-20) Cheng attempts to distinguish the Third Circuit's *per curiam* opinion in *Cheng v. Immigration and Naturalization Service* by asserting that certain factual distinctions between that case and his case, such as the fact that he never conceded being a Nationalist Chinese citizen, that he never applied for asylum from deportation to Mainland China, and that he never engaged in any dilatory behavior, limit the Third Circuit's decision in *Cheng* to its facts. Clearly such a contention is unsustainable in light of the statement of the issue (as framed by the Court) and the Court's eventual decision which rested almost entirely on the State Department's communication, not on the facts in the petitioner's immigration history.

ed States and two governments who both make claims upon the same geographic area, and the courts, including the Courts of this Circuit, have held so repeatedly. *Ng Kam Fook v. Esperdy*, *supra*; *United States ex rel. Man v. Murff*, *supra*. At this juncture in Sino-American relations, this Court should not interject itself into these delicate processes unless absolutely necessary. This case certainly does not present such a situation.

POINT II

The Attorney General's Determination, That Cheng Was A Citizen Of Nationalist China For The Purposes Of Section 243(a) Of The Act, Was Correct And Supported By Substantial Evidence In The Record Considered As A Whole.

Assuming *arguendo*, that the Attorney General's determination of citizenship under Section 243(a) is reviewable in circumstances where two governments claim to represent one country, and that this Court has the requisite authority to determine whether the Attorney General's conclusion that Cheng was a citizen of Nationalist China was correct, nevertheless the propriety of that decision is apparent from the facts contained in the administrative record of this case.

A. Standard Of Review

Cheng's motion to amend the allegation of nationality contained in the order to show cause has no analogue in other portions of the Act. However, once he conceded his deportability and elected to contest only his citizenship, an issue unrelated to his deportability, his motion was tantamount to any other application for relief based on a factual record. As such, he had the burden of proof to

demonstrate his entitlement to the relief he sought, *United States ex rel. Rongetti v. Neilly, supra; Roumeliotis v. Immigration and Naturalization Service*, 304 F.2d 453 (7th Cir.), *cert. denied*, 371 U.S. 921 (1962), and the Attorney General's determination on his motion must be affirmed if supported by reasonable, substantial, and probative evidence on the record considered as a whole. Section 106(a)(4) of the Act, 8 U.S.C. § 1105a(a)(4). It is against this standard that Cheng's claim to citizenship in Mainland China must be judged to ascertain if he fulfilled his burden of proof.

B. The Attorney General's Determination Was Supported By The Record

The allegation of nationality in Cheng's order to show cause was based on two factors. Initially, the Board of Immigration Appeals' precedent decision in *Matter of S-Y-L* required the Service to consider Cheng to be a citizen of Nationalist China. In addition, his departure from the Chinese mainland and subsequent acquisition of a Hong Kong seaman's book, a reflection of his abandonment of the Mainland Chinese Government, also indicated his adherence to the Nationalist Chinese, the only other alternative since Cheng has made no claim to Hong Kong citizenship. These factors were presented to the Immigration Judge who presided at the hearing and it was incumbent upon Cheng to present evidence to rebut them and to show his continued allegiance to Mainland China.

Although Cheng did make a motion to amend the allegation of nationality in the order to show cause, he made no affirmative statement of loyalty to the Mainland Chinese and introduced no evidence, either before the Immigration Judge or later before the Board of Immigration Appeals, to support his motion. Moreover, when

given the opportunity pursuant to Section 243(a) of the Act to designate a country to which he could be deported, Cheng did not select Mainland China, as might be expected under the circumstances, but rather chose Singapore.

On the basis of the evidence before the Immigration Judge, and the Board, and the total absence in the record of any proof supporting Cheng's contention that he remains a citizen of Mainland China or indicating that he had any current relationship with that country, the determination made pursuant to Section 243(a) of the Act, that Cheng was a citizen of Nationalist China, was clearly supported by substantial evidence and should be affirmed.

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York
April 7, 1977.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Milton Bader being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
2 copies
he served ~~copy~~ of the

8th day of April 19 77
within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Thomas Sung, Esq.,
217 Park Row,
NY NY 10038

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

8th day of April, 19 77

PAULINE P. TROIA
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No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978